

ARKANSAS COURT OF APPEALS  
NOT DESIGNATED FOR PUBLICATION  
ROBERT J. GLADWIN, JUDGE

DIVISION IV

CA06-1105

MARCH 7, 2007

BRANDY JOHNSON

APPELLANT

APPEAL FROM THE WASHINGTON  
COUNTY CIRCUIT COURT  
[NO. JV 2005-165]

V.

ARKANSAS DEPARTMENT OF  
HEALTH and HUMAN SERVICES

APPELLEE

HON. STACEY ZIMMERMAN,  
JUDGE

REVERSED

Appellant Brandy Johnson appeals the July 21, 2006, Washington County Circuit Court order, which terminated her parental rights. Appellant claims that the trial court had insufficient evidence before it to terminate her parental rights, and that the trial court erred by not choosing the less restrictive alternative of placing permanent custody of the minor child with relatives. We agree that the trial court relied upon insufficient evidence and reverse.

*Facts*

Appellant's two children, JR and her half sister MP, were taken into the appellee's, Arkansas Department of Health and Human Services (DHS), custody in February 2005,

based upon a report of inadequate supervision and food for the children. After DHS contacted appellant, she met with a worker at DHS and agreed to take a drug test. Appellant tested positive for methamphetamine and admitted to using the drug two days prior to the test. The trial court found probable cause that the children were dependent-neglected, and placed them in the custody of MP's grandmother. Subsequently, the children were adjudicated dependent-neglected, and the appellant was ordered to do the following: complete an alcohol and drug assessment and follow the assessment's recommendations; follow the case plan; pass all drug screens when requested by DHS; not use illegal drugs; cooperate with the department; pay child support of thirty dollars per week beginning April 8, 2005; and maintain stable housing and employment.

In July 2005, MP was ordered to remain on a permanent basis with her grandmother, and JR was placed with Janie and Joey Halliburton, relatives of JR's father. Appellant was awarded visitation with JR two times per week at the Halliburtons', ordered to pay fifteen dollars per week child support, and ordered to obtain her driver's license. At the October 26, 2005, review hearing, the court set a show-cause hearing on both appellant and JR's father. That hearing was held November 17, 2005, and appellant was found in contempt of court for testing positive for methamphetamine.<sup>1</sup> Appellant was pregnant at the time. The trial court sentenced her to three days in the county jail.<sup>2</sup>

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<sup>1</sup>The exact date of the drug test is not included in the record before this court.

<sup>2</sup>The father was found guilty of contempt at that time, and also sentenced to three days in jail.

The trial court held a permanency planning hearing on February 1, 2006, at which time the trial court maintained the goal of permanent custody with a relative. At the permanency planning hearing held March 15, 2006, the trial court found that it was contrary to JR's welfare for custody to be returned to her parents. Specifically, the court found that the parents had not complied with the case plan and orders of the court, citing that appellant had failed a drug test in November 2005 while she was four-months pregnant. Further, appellant had not maintained regular visitation with the child. The trial court found that the goal of the case should be termination of parental rights with the goal of adoption. Visitation with the parents continued to be supervised. At the termination hearing of June 22, 2006, the evidence was that appellant had complied with the case plan in that she had been living in stable housing for a year, and that three weeks prior to the hearing, she moved into her mother's home in Springdale, Arkansas. According to testimony from the caseworker, appellant's mother had recently been released from prison on a drug conviction. Appellant had maintained a job for a year and paid her child support. Appellant had visited with the child regularly since visitation was moved from the Halliburtons' home to the DHS office. Appellant's drug tests since November 2005 had been negative. However, the trial court found that appellant did not remedy the conditions that caused the child to come into care and terminated her parental rights. Appellant filed her timely notice of appeal on June 27, 2006.

*Statement of law*

The standard of review in cases involving the termination of parental rights is well established. Arkansas Code Annotated section 9-27-341(b)(3) requires an order terminating parental rights to be based upon clear and convincing evidence. *Camarillo-Cox v. Ark. Dep't of Human Servs.*, 360 Ark. 340, 201 S.W.3d 891 (2005). Clear and convincing evidence is that degree of proof that will produce in the fact finder a firm conviction as to the allegation sought to be established. *E.g., Lewis v. Ark. Dep't of Human Servs.*, 364 Ark. 243, \_\_\_ S.W.3d \_\_\_ (2005). When the burden of proving a disputed fact is by clear and convincing evidence, the question that must be answered on appeal is whether the trial court's finding that the disputed fact was proven by clear and convincing evidence was clearly erroneous. *Id.* A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made. *Gregg v. Ark. Dep't of Human Servs.*, 58 Ark. App. 337, 952 S.W.2d 183 (1997). Such cases are reviewed de novo on appeal. *Wade v. Ark. Dep't of Human Servs.*, 337 Ark. 353, 990 S.W.2d 509 (1999). However, appellate courts do give a high degree of deference to the trial court, as it is in a far superior position to observe the parties before it and judge the credibility of the witnesses. *Dinkins v. Ark. Dep't of Human Servs.*, 344 Ark. 207, 40 S.W.3d 286 (2001).

Section (b)(3) of Ark. Code Ann. § 9-27-341 (Repl. 2002), states in pertinent part as follows:

(3) An order forever terminating parental rights shall be based upon a finding by clear and convincing evidence:

(A) That it is in the best interest of the juvenile, including consideration of the following factors:

(i) The likelihood that the juvenile will be adopted if the termination petition is granted; and

(ii) The potential harm, specifically addressing the effect on the health and safety of the child, caused by returning the child to the custody of the parent, parents, or putative parent or parents; and

(B) Of one (1) or more of the following grounds:

(i)(a) That a juvenile has been adjudicated by the court to be dependent-neglected and has continued out of the custody of the parent for twelve (12) months and, despite a meaningful effort by the department to rehabilitate the parent and correct the conditions that caused removal, those conditions have not been remedied by the parent.

(b) It is not necessary that the twelve-month period referenced in subdivision (b)(3)(B)(i)(a) of this section immediately precede the filing of the petition for termination of parental rights or that it be for twelve (12) consecutive months;

(ii)(a) The juvenile has lived outside the home of the parent for a period of twelve (12) months, and the parent has willfully failed to provide significant material support in accordance with the parent's means or to maintain meaningful contact with the juvenile.

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(vii)(a) That other factors or issues arose subsequent to the filing of the original petition for dependency-neglect that demonstrate that return of the juvenile to the custody of the parent is contrary to the juvenile's health, safety, or welfare and that, despite the offer of appropriate family services, the parent has manifested the incapacity or indifference to remedy the subsequent issues or factors or rehabilitate the parent's circumstances that prevent return of the juvenile to the custody of the parent.

Ark. Code Ann. § 9-27-341 (b)(3)(A)-(B)(ii)(a) and (vii)(a).

#### *Arguments*

Appellant argues that under Ark. Code Ann. § 9-27-341, her rights should not have been terminated because there was not clear and convincing evidence presented to the trial

court that she failed to correct the conditions that caused the removal of the child from her custody. Appellant testified at the termination hearing that she had stable housing and had maintained a job for a year, that she was current in child support, and that she had consistently visited JR. She also claims that all her drug tests since November 2005 were negative. This testimony was consistent with that of Rasheda Allwood, the family service worker for JR, who testified at the termination hearing that appellant had remedied the conditions that caused removal of her children. Further, both Ms. Allwood and appellant testified that appellant was current in child support.

Appellant emphasizes that even though she missed some visitations scheduled at the Halliburtons' residence, she did not miss any visitations once they were scheduled at the DHS office. Ms. Allwood testified that there were conflicting stories between the appellant and the Halliburtons regarding visitation. Ms. Allwood stated that because of this, DHS wanted to see if the appellant would come to visitation when it was supervised at the DHS office. Visitation at the DHS office was established at the permanency planning hearing in March 2006, and thereafter, appellant maintained regular visitation.

Ms. Allwood confirmed that appellant had lived in the same residence for a year, and three weeks prior to the termination hearing, she and her five-month-old baby moved in with her mother in Springdale, Arkansas. Ms. Allwood considered this arrangement as stable after visiting the house. Although Ms. Allwood testified that appellant's mother had recently been released from prison on drug charges, no further evidence was offered

regarding appellant's mother. No evidence was provided regarding the charges or the conditions of the mother's release from prison. Appellant argues, therefore, that the trial court was speculating when it stated that the grandmother had paroled out of prison. Appellant argues that if in fact the grandmother was on parole, a parole officer would likely be doing regular drug screening, and appellant and her mother would have stronger incentive to remain drug-free. Further, appellant argues that moving in with her mother not only saves her money, but also provides help with child care.

Appellant points out that the trial court allowed appellant to retain custody of her five-month-old child and did not include that child in this litigation. Therefore, she argues that even though she is living with her mother and had tested positive for drug use in November 2005, the trial court did not find her home to be an unsafe environment to raise a child, or that she is an unfit parent as of June 2006.

DHS argues that the most important ground for termination found by the trial court is that subsequent to the dependency-neglect adjudication, other factors arose that demonstrated appellant was indifferent to remedying her conditions. Appellant tested positive for drugs in November 2005, was held in contempt of court, and was given a three-day jail sentence. DHS claims that this makes her indifferent to remedying her conditions. *Carroll v. Ark. Dep't of Human Servs.*, 85 Ark. App. 255, 148 S.W.3d 780 (2004). Likewise, DHS argues that if she were serious about avoiding drug use and drug users, she would not have moved in with her mother.

However, appellant points out that all drug screens from November 2005 to June 2006 were negative. With the negative drug screens and the progress she made based on the requirements of DHS and the trial court, the record shows that she was not indifferent to remedying her conditions. Also, appellant states that DHS's argument regarding her mother is conjecture, as there was no evidence regarding appellant's mother's drug use presented at the hearing, other than Ms. Allwood's statement that the appellant's mother had been recently released from prison. We agree.

The trial court relied heavily in its ruling from the bench on the fact that appellant had moved in with her mother, whom the court believed to be a "felon who just got out of the pen for drugs." The trial court agreed that appellant remedied her drug use, and that appellant was in compliance as far as DHS is concerned. However, the trial court stated that she believed appellant's moving in with someone "on parole for illegal drugs" would be too tempting for appellant. However, there was no evidence regarding the circumstances of appellant's mother's conviction, parole or probation. It is possible to assume, as appellant argues, that appellant's move is a positive one because if her mother is subject to supervisory conditions, her mother has strong incentives not to allow drug use in her home.

Finally, under *Trout v. Ark. Dep't of Human Servs.*, 84 Ark. App. 446, 146 S.W.3d 895 (2004), DHS argues that this court should give no weight to a parent's compliance with the court orders and case plan after the child has been in foster care for one year. In *Trout*, this court reversed the trial court's termination order, and remanded for further



consideration. However, DHS sought review by the supreme court, which reversed this court's decision. *See Trout v. Ark. Dep't of Human Servs.*, 359 Ark. 283, 197 S.W.3d 486 (2004). The supreme court's reasoning is set forth as follows:

However, to agree with Amanda's [the mother's] claims that the court should have given her more time to comply with its orders would be to ignore the fact that she had consistently failed to comply with the court's orders over the course of nearly two years. Throughout the course of this case, Amanda maintained contact with Andrew, who, from all the evidence, was clearly abusive and violent. She failed to find employment until the week of the November hearing, nearly two years after her case had come to the court's attention. She persistently failed to complete court-ordered courses of counseling and therapy. The fact that she had purchased a trailer and had paid the rent on the lot for six months was indeed a positive development, but she stated that she had paid for these things with money from the car-wreck settlement, and did not indicate where or whether she would be able to find money after those funds ran out. In sum, the trial court was justified in concluding that there was little likelihood that she would ever be ready to be reunited with her children.

*Trout*, 359 Ark. at 294, 197 S.W.3d at 493.

We hold that the instant case can be distinguished from *Trout* in that appellant herein did comply with the case plan. She admittedly fell short in November 2005, by failing the drug test. She was meted out punishment for her contemptuous behavior, and the record reflects that between November 2005 and June 2006 appellant's drug tests were negative. Appellant did fail to consistently visit the child when the visitations were scheduled at the Halliburtons' home; however, she became consistent when visitation was moved to the DHS office. She complied in all other aspects of the case plan as testified to by Ms. Allgood.

The attorney ad litem points out in her argument that the first permanency planning hearing was held on February 1, 2006, at which time the trial court maintained the goal of

permanent custody with a relative. We note here that this hearing was held after appellant had been held in contempt in November 2005 for drug use. A month and a half later, on March 15, 2006, a second permanency planning hearing was held and the trial court changed the goal to termination of parental rights and adoption based upon appellant's having failed a drug screen while four months pregnant (in November 2005) and not maintaining regular visitation with the child.

The ad litem argues that under Ark. Code Ann. § 9-27-338, a parent's resumption of contact or overtures toward participating in the case plan or following the orders of the trial court in the months or weeks immediately preceding the permanency hearing are insufficient grounds for retaining reunification as the permanency plan. Although this is correct, here the evidence shows that appellant's compliance with the case plan was not limited to the months or weeks immediately preceding the permanency hearing. We find that the evidence shows that appellant complied with the case plan, falling short in November 2005 and in regard to visitation at the Halliburton residence only. Because the record reflects that she remained drug free for the seven months preceding the termination hearing and regularly visited for nearly four months preceding the termination hearing, we hold that the trial court's decision to terminate was clearly erroneous.

Because we find insufficient evidence to terminate parental rights, we do not address the appellant's alternative argument regarding the less-restrictive placement of permanent custody.

Reversed.

ROBBINS and GRIFFEN, JJ., agree.